

This letter discusses the application of sales tax to charges for software upgrades and technical support. See 86 Ill. Adm. Code 130.1935. (This is a GIL.)

September 24, 2001

Dear Xxxxx:

This letter is in response to your letter dated July 12, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

Please note that our company is considering sales in your State. We would like to get a ruling from you on what components of our monthly support fee are taxable versus non-taxable elements. Please review our following descriptions and let me know on an individual basis the ruling on each aspect of our support program. All software mentioned is canned software and each element is separately stated on the monthly support billings. If you need further clarification on any of the descriptions below, please contact me.

Customer Care: Software support services entailing assistance via telephone, fax and email help on the main computer software package. This will include instruction and database analysis.

Taxable _____ or Non-Taxable _____

Desktop Maintenance: Maintenance contract that keeps inter-office email/communications software running from year to year. This will also include software enhancements on this software package.

Taxable _____ or Non-Taxable _____

Hardware Maintenance: This component basically covers an annual hardware warranty contract.

Taxable _____ or Non-Taxable _____

NAME Software Enhancements: Ongoing software developments of NAME software that is released to customers on a semi-annual to annual basis. This is released in the form of a tangible data cartridge tape and mailed or couriered to customers.

Taxable _____ or Non-Taxable _____

Operating System Maintenance: This covers a partial support and enhancement contract to support their Computer's Operating System for Universe Databases.

Taxable _____ or Non-Taxable _____

Thank you for addressing our tax questions. This will assist greatly in the administration of our future needs.

Please return completed form to my attention.

Sales of "canned" computer software are taxable retail sales in Illinois. See the enclosed copy of 86 Ill. Adm. Code 1935. If the computer software consists of custom computer programs, then the sales of such software are not taxable retail sales. See subsection (c) of Section 130.1935.

A license of software is not a taxable retail sale if:

Under subsection (a)(1), a license of software is not a taxable retail sale if:

- A) it is evidenced by a written agreement signed by the licensor and the customer;
- B) it restricts the customer's duplication and use of the software;
- C) it prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) the licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) the customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax.

In general, maintenance agreements that cover computer software and hardware are treated the same as maintenance agreements for other types of tangible personal property. See Section 130.1935(b). The taxability of maintenance agreements depends upon if the charges for the agreements are included in the selling price of the tangible personal property. If the charges for the agreements are included in the selling price of the tangible personal property, those charges are part of the gross receipts of the retail transaction and are subject to tax. No tax is incurred on the maintenance services or parts when the repair or servicing is performed.

If maintenance agreements are sold separately from tangible personal property, sales of the agreements are not taxable transactions. However, when maintenance services or parts are provided under the maintenance agreements, the service or repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance service. See 86 Ill. Adm. Code 140.301(b)(3), enclosed.

Charges for updates of canned software are fully taxable under Section 130.1935(b). If the updates qualify as custom software under Section 130.1935(c), they may not be taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreements would be taxable as sales of canned software.

Charges for telephone support, training, installation, configuration, and troubleshooting are exempt if they are separately stated from the selling price of canned software. See Section 130.1935(b). If these services are provided in conjunction with a sale of custom computer software or a license of computer software, the charges for those services are not subject to tax.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Martha P. Mote
Associate Counsel

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Enc.